No. 92-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,
v.
THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
MARY V. DICRESCENZO
NATIONAL ASSOCIATION OF HOME BUILDERS
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0200

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Amicus
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") respectfully files this brief as *amicus curiae* in support of the Petitioner. The NAHB has received the written consent of counsel to file this brief, and has filed the letters of consent with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The NAHB represents over 158,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia and Puerto Rico. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land devel-

opers and remodelers. It is the principal spokesman for the American shelter industry.

The NAHB is before this Court because of its interest in the Just Compensation Clause of the Fifth Amendment and the implications of the decision below on the jurisdiction of the Claims Court to hear such claims. The NAHB views the Just Compensation Clause as an important shield against oppressive federal land use regulation. The availability of compensation for Government action that results in a "taking" is critical to the livelihood of private landowners who either (1) have lost all reasonable economic use of their property because of Government decisions intended to serve the broader public interest; or (2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. Since the Claims Court has exclusive jurisdiction over most such takings cases involving the federal Government, the NAHB is vitally interested in any procedural device which would divest that court of jurisdiction to hear such claims.

FACTUAL CONSIDERATIONS

The facts in the instant case represent a typical fact pattern for a motion to dismiss under 28 U.S.C. § 1500 ("Section 1500"). Plaintiff in the Claims Court, either prior or subsequent to filing a claim in that court, files or has filed a related suit against the United States in federal district court. The Government then files a motion to dismiss the action in Claims Court, even if the district court action is no longer pending. Although the scenario of the case under review is typical, there are a number of other situations in which Section 1500 operates which are of particular interest to *amicus*.

Many of these situations grow out of the federal government's regulation of wetlands under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Under Section 404, any person proposing to fill a wetland must obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). If a permit is denied, the landowner may seek review of the Corps' decision in district court, the only court which has jurisdiction over the matter, alleging that the denial was arbitrary and capricious. The landowner may also believe that the permit denial constitutes a "taking" under the Fifth Amendment, and therefore may file a claim in Claims Court, which has exclusive jurisdiction over takings claims in excess of $10,000. It is common for landowners to file a takings claim in Claims Court while the challenge to the permit denial is pending in district court in order to preserve the claim before the running of the statute of limitations. Based on the Federal Circuit's decision in the case under review, the Government has recently taken the position that Section 1500 bars resort to the Claims Court, even though the Claims Court cannot grant the relief sought in the district court and the district court cannot grant the relief sought in the Claims Court.

The severe impact of the *UNR* decision [1] on these types of cases is illustrated by a recent takings case involving a homebuilder. In that case the Corps denied a permit to fill wetlands, and the homebuilder filed a challenge in district court. One year later, while the permit challenge was still pending, the homebuilder filed a takings claim in Claims Court, which the homebuilder and the Government agreed to stay pending the resolution of the district court action. The district court subsequently upheld the Corps' permit denial.[2] The Claims Court then found that the permit denial constituted a taking under the Fifth Amendment and awarded the homebuilder

---

[1] *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), *cert. granted, sub. nom., Keene Corp. v. United States*, 113 S. Ct. 373 (1992).

[2] *See Loveladies Harbor, Inc. v. Baldwin*, 20 Env't. Rep. Cas. (BNA) 1897 (D.N.J. 1984), *aff'd mem.*, 751 F.2d 376 (3d Cir. 1984).

$2,658,000 plus interest.[3] The Government's appeal of this ruling is now pending before the Federal Circuit. After issuance of the decision in *UNR* the Government has moved in the Federal Circuit to dismiss the claim and vacate the award, arguing that because the challenge to the permit denial and the takings claim were pending at the same time and arose from the same operative facts (*i.e.*, the Corps' permit denial), Section 1500 divests the Claims Court of jurisdiction.[4]

SUMMARY OF ARGUMENT

The Federal Circuit's conclusion that Section 1500 operates as an absolute bar to jurisdiction in the Claims Court whenever a plaintiff simultaneously has or had pending a district court and a Claims Court action is inconsistent with the history of Section 1500. This provision was originally enacted to force a small class of claimants seeking only money damages against the Government to choose between seeking such relief in either district court or in Claims Court. Nothing in the legislative history of Section 1500 suggests that it was intended to bar jurisdic-

[3] *See Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

[4] The Government has also taken the position that Section 1500 may operate against litigants who are brought unwillingly into the Claims Court through the operation of 41 U.S.C. § 114(b). In *Thomas Mercer, et al. and Eastern Resources, Inc. v. United States*, No. 91-23-L (W.D. Ky. filed Feb. 26, 1990), for example, the lessee of a surface coal mine brought a declaratory judgment action in the district court to test a cease and desist order issued by the Corps relating to the alleged unlawful filling of wetlands in Western Kentucky. While that litigation was in progress, the lessor brought a takings case in the Claims Court and the court, on the government's motion pursuant to 41 U.S.C. § 114(b) and R.U.S.C.C. No. 14, ordered the lessee to assert any claims it might have relating to the lessor's case or be forever barred. The lessee filed its claim in Claims Court pursuant to this order, and after the *UNR* decision, the Government responded by seeking a dismissal pursuant to Section 1500. That motion is still pending.

tion in the Claims Court simply because the plaintiff has a related claim pending in another court at some point during the Claims Court action.

The Federal Circuit's decision in *UNR* also disrupts established jurisdictional principles of this Court and decades of sound practice by the Claims Court. Under past practice, a plaintiff who ran afoul of Section 1500 by having two claims pending concurrently could "cure" the defect by dismissing the district court action and remaining in the Claims Court. This practice was consistent with the text of Section 1500, which is triggered only when two claims are "pending" at the same time. If one claim is no longer "pending," Section 1500 is not brought into operation.

The *UNR* court compounds its mischief by reaching beyond the case at hand and deciding that Section 1500 bars litigants with no choice of forum from seeking different relief at the same time in district court and Claims Court. Because the Claims Court has exclusive jurisdiction over certain matters relating to the Federal Government and because its authority is generally limited to granting monetary relief, plaintiffs seeking equitable or other forms of relief from the Government often have no choice but to file a separate action in district court. Such parties have no choice of forum and therefore cannot elect to remain in either Claims Court or district court. Nonetheless, in order to avoid the running of the statute of limitations on either claim, these parties are often forced to have both matters pending at the same time. The *UNR* decision, however, reversed decades of case law holding that Section 1500 is inapplicable where the plaintiff has no choice of forum. Therefore, the effect of this decision is to deprive citizens of the opportunity to obtain the relief available under the law against the Government.

ARGUMENT

I. SECTION 1500 WAS NOT INTENDED TO OPERATE AS A JURISDICTIONAL BAR

The opinion of the Federal Circuit in *UNR* is based on the proposition that Section 1500 establishes a jurisdictional bar that either precludes the Claims Court from asserting jurisdiction at the outset, or divests the Claims Court of jurisdiction it once had, at any stage of the litigation if a claim in another court involving substantially the same facts overlaps with the Claims Court case by even one day. The effect of the decision is to transform what had for decades been regarded as a curable litigation defect—the existence of a Claims Court case and a district court case pending at the same time—into a fatal jurisdictional bar that the plaintiff is powerless to cure, even by voluntarily dismissing the action pending in district court. This interpretation of Section 1500 is inconsistent with its legislative history and the jurisdictional precedents of this Court.

A. Congress Did Not Intend Section 1500 To Act as an Absolute Bar Whenever Two Cases Have Been Pending at the Same Time

When first passed, the original version of Section 1500 had a relatively modest objective: "to require an election between a suit in the Court of Claims and one brought in another court . . . in which the judgment would not be res adjudicata in the suit pending in the Court of Claims . . . ." *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932). The problem was the limited application at that time of principles of *res judicata* to separate suits against the Government and against its agents. Congress' concern was that claimants could bring an action in one court against a Government agent for money damages, and another claim against the United States in another court seeking essentially the same money damages. The Government would be at risk

twice because there would be no *res judicata* effect from either judgment. Consequently, Congress enacted the predecessors to Section 1500 to spare the Government from defending itself against the same claim for money damages in two courts at the same time. One commentator has thoroughly reviewed the background to Section 1500 and confirms this view:

> The underlying reason for the section was the limited application of the rule of res judicata in suits against Government and against government officers. Without the section . . . the claimants could retry the issues in a second suit against the United States. This was possible because the judgment in the first suit against the government officer-agent would not be res judicata in the second suit against the United States. Accordingly, the election required by the statute has been understood as designed only to provide a substitute for the absent rule of res judicata in successive suits against a government officer and against the Government.

Schwartz, *Section 1500 of The Judicial Code and Duplicate Suits Against The Government and Its Agents*, 55 Geo. L. J. 573, 578 (1967).

The concern over the Government being compelled to defend itself against duplicative suits for money damages arose in connection with legislation enacted to compensate certain victims of the Civil War. *See generally UNR*, 962 F.2d at 1017-19. Toward the close of that war, Congress passed the Captured and Abandoned Property Act to permit claimants who had been loyal to the Union to recover property, particularly cotton, that had been seized by the Government in furtherance of its war effort.[5] The Act provided: ". . . any person claiming to have been the owner of any such abandoned or captured

---

[5] *See* Captured and Abandoned Property Act of 1863, 37th Cong., 3d Sess., ch. 120, 12 Stat. 820 (hereinafter the "Act" or the "Abandoned Property Act").

property may, at any time within two years after the suppression of the rebellion, prefer his claim . . . to the court of claims." Prior to the passage of the Act, claims involving abandoned or captured property could only be brought in a district court against an officer of the United States under a tort theory. The Act gave the so-called "cotton claimants" the choice to sue the United States Government in the Court of Claims or, as previously, an officer of the United States in a district court.[6]

As a result of this dual jurisdiction, the United States was frequently forced under the Abandoned Property Act to defend against the same action in the Court of Claims it had won in a different forum. Reacting to what was considered an abuse of the legal process, Congress passed a new statute in 1868 that required such "cotton claimants" to make an election between proceeding in a district court and the Court of Claims. Section 8 of this statute, a predecessor to Section 1500, provided: "no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he . . . . shall have commenced and has pending any suit or process in any other court . . . ." Act of June 25, 1868, § 8, 15 Stat. 75, 77. *See generally UNR*, 962 F.2d at 1017-19.[7] As Senator Edmunds of Vermont, the author of the bill, explained:

[6] *See generally Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1561 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

[7] Section 8 was incorporated into the Revised Statutes of 1874 without any substantive revision. *See* 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler). The provision was then adopted without change in the Judicial Code of 1911. *See* Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1135, 1138 (*codified at* 28 U.S.C. § 260 (1940)). Section 8 was next adopted as part of the Judicial Code in 1948, and was modified to its current form as Section 1500. *See* Act of June 25, 1948, ch. 646, 62 Stat. 942 (*codified at* 28 U.S.C. § 1500 (1948)). In the absence of substantive changes to Section 8, the current version of Section 1500 should be interpreted consistently with Section 8. *See Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965) ("there is no evidence of any intent of Congress at any time to change the legal effect of the original Section 8 of the Act of June 25, 1868"), *cert. denied*, 382 U.S. 976 (1966).

> The object of this amendment [Section 8] is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (*quoted in UNR*, 962 F.2d at 1018).

Three things are readily apparent from this oft-quoted legislative history. First, at the time the Act of 1868 was passed, Section 8 was intended to apply only to claimants under the Abandoned Property Act. Although Section 1500 has been given a broader application over the years, its original purpose was limited. Second, the section was designed to conserve Government resources by preventing litigants from having "two bites at the apple" in different courts against the Government. Finally, the section is inapplicable when the claimant has no choice of forum, because its purpose was to require litigants with claims for money damages against the Government to "elect[] between a suit in the Court of Claims and one brought in another court." *Matson Navigation*, 284 U.S. at 356.[8]

Contrary to the *UNR* holding, the purpose of Section 1500 was not to create a bar preventing litigants from

[8] We discuss this point in greater detail in Part II, *infra* at 15-19.

having access to the Claims Court. Senator Edmunds' statement in the legislative history makes it clear that the purpose of the statute is to require litigants to make an "election" of forum and to either "leave" the Claims Court or to "leave" the other court. There is no indication in this statement that, once a litigant "leaves" the district court in accordance with this provision, the litigant will be barred on jurisdictional grounds from pursuing the claim in Claims Court. Section 1500 was intended to protect the Government from duplicative litigation, not to deprive litigants with claims against the Government from asserting those claims in an appropriate forum. By transforming Section 1500 from a limited measure intended to conserve litigation resources into a blunt instrument that deprives litigants of an opportunity to bring those claims, the *UNR* court went beyond the language and history of Section 1500.

B. Dismissal of the District Court Action Can "Cure" the Defect and Allow the Claims Court To Retain Jurisdiction

In addition to lacking support in the language and legislative history of Section 1500, the analysis of the *UNR* court is contrary to jurisdictional principles established by this Court and the long-established practice of the Claims Court. In ruling that Section 1500 operates as a jurisdictional defect that divests the Claims Court of jurisdiction whenever a second claim has been filed in another court, the Federal Circuit overturned decades of judicial interpretation and sound jurisdictional principles.

The flaw in the *UNR* court's reasoning is its view that the concurrent existence of cases in the Claims Court and another court creates a jurisdictional defect that cannot be remedied. The court construed the pendency of two claims as a fatal defect, similar to the lack of subject matter jurisdiction, that cannot be cured. No party can waive the absence of subject matter jurisdiction; *see Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); this defect can be addressed by a court at any time, *see, e.g.*, Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"); and a court may raise it on its own motion. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). In contrast to fatal jurisdictional defects such as lack of subject matter jurisdiction, courts have recognized certain litigation defects that can be cured by the plaintiff. *See, e.g., Ranger Transportation, Inc. v. Wal-Mart Stores*, 903 F.2d 1185, 1187 (8th Cir. 1990) (proper procedure where indispensable party is absent from litigation is to give the parties an opportunity to bring in that party, not to dismiss the action).

Under past practice interpreting Section 1500, the existence of a claim in district court has been consistently interpreted as a curable litigation defect, not a jurisdictional bar. Thus, a claimant who has run afoul of Section 1500 is given the opportunity to cure the defect. In *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966) (per curiam), for example, the Court of Claims dismissed a claim because petitioner had a similar claim pending in a district court at the same time. When the district court dismissed the action for lack of jurisdiction, the Court of Claims vacated its previous decision and reinstated the original claim. The court stated: "Our earlier order of dismissal was predicated on the fact that the other 'claim remains pending in the said District Court.' That is no longer true, and the claim is no longer 'pending in any other court.'" *Id.* at 1004 (citation omitted).[9] Even where the Court of Claims has dismissed a claim because of the pendency of a similar claim in another court, the court has stated that the plaintiff is precluded from bring-

[9] The *UNR* court expressly overruled *Brown*. *See UNR*, 962 F.2d at 1022.

ing a second claim only "so long as said claim remained pending in the District Court." *Frantz Equipment Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951).

The Claims Court loses jurisdiction only when a plaintiff has failed to "cure" the defect and has the same claim pending in another court at the time the Claims Court rules on a motion to dismiss under Section 1500. Section 1500 is directed only at instances where a plaintiff with a claim in Claims Court "has pending" a second claim against the United States in another court. The proper interpretation of the phrase "has pending" is to read it as "is pending when the court acts on a motion to dismiss." A plaintiff who has filed claims against the United States in two courts may continue to proceed in Claims Court, consistent with Section 1500, so long as the other claim is no longer pending when the Claims Court rules on a motion under Section 1500. To read the usage of the present tense in Section 1500—addressing instances where the second claim "is pending"—to reach instances where the second claim was "once pending at some earlier time" strains the plain language of the statute.

The *UNR* holding can be tested by two hypotheticals. First, if a plaintiff files an action in district court after he has filed a similar claim in Claims Court, why does the Claims Court lose jurisdiction? Filing in another forum may be a litigation flaw, but it should not bar the initial tribunal from hearing the case if that court had subject matter jurisdiction at the outset. Second, if a plaintiff files a claim in district court followed by a claim in the Claims Court and then dismisses his district court suit before the Government answers or moves to dismiss, why should his Claims Court claim be dismissed? He has put the Government to no expense, nor has he wasted judicial or legal resources.

This Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991) (per curiam). Thus, once a proper claim has been duly filed in the Claims Court, the court has jurisdiction over the claim regardless whether the litigant subsequently files a claim in district court, although it may be subject to dismissal upon proper motion. This is the holding of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), which held that the Claims Court was not divested of jurisdiction if the plaintiff commenced an action on the same claim in another court after the filing of the action in Claims Court.[10]

The rule established in *UNR* is also inconsistent with this Court's jurisdictional precedents when applied to instances where the claim in another court is filed prior to the filing of the complaint in Claims Court. As this Court has acknowledged, even the rule that the presence or absence of jurisdiction is established at the time of filing is subject to exceptions. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2222 (1989). In *Newman-Green*, plaintiffs brought a claim in federal court on the basis of diversity jurisdiction although complete diversity was absent. This Court held that the Court of Appeals had the authority to grant the plaintiff's motion to dismiss a dispensable non-diverse party in order to establish complete diversity and maintain federal subject matter jurisdiction. *Id.* at 2223-26. Thus, even though jurisdiction may be lacking at the time of the filing of the complaint, subsequent action of a plaintiff to correct the jurisdictional deficiency allows a federal court to retain jurisdiction. Absence of diversity is a defect more serious than the issue addressed by Section 1500, yet the *Newman-Green* decision demonstrates that such a defect is curable. Accordingly, under similar

---

[10] The *UNR* court expressly overruled *Tecon Engineers*. *See UNR*, 962 F.2d at 1023.

reasoning, Section 1500 should be read to allow the Claims Court to retain jurisdiction over cases filed with the Claims Court where an earlier-filed district court claim has been disposed of.

The original statute did not withdraw subject matter jurisdiction from the Claims Court, but provided that "no person shall file or prosecute any claim" where the party has the same claim "pending" in another court.[11] This language is by its terms a litigation defect which is curable. The Federal Circuit in the *UNR* opinion suggested this Court has construed the phrase "no person shall file or prosecute" as a form of permanent jurisdictional bar, citing *In Re Skinner & Eddy Corp.*, 265 U.S. 86 (1924), but such a reading goes too far. The actual holding in that case is that a plaintiff in the Claims Court had an absolute right to dismiss a claim before judgment, just as he had at common law or in equity. As additional support for its decision, the *Skinner* Court referred to the predecessor of Section 1500, stating that the institution of a suit against the Government in state court one day after dismissal from the Court of Claims of the same cause of action "necessarily prevented the petitioner from suing on those claims in the Court of Claims . . . ." *Id.* The Court nowhere intimates that the institution of a suit in another court is a permanent flaw which could not be cured.

[11] Section 1500 currently states that the Claims Court "shall not have jurisdiction" over claims where the same claim "is pending" in another court. 28 U.S.C. § 1500. The change between the language of the earlier version and the current version was intended to be "in phraseology" only. *See* Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948) (*quoted in UNR*, 962 F.2d at 1018). Thus, the current version of Section 1500 should be read consistently with the earlier version. *See supra* n.7.

II. SECTION 1500 OPERATES ONLY WHEN A LITIGANT HAS A CHOICE OF FORUM

One remarkable feature of the *UNR* opinion is that the Federal Circuit went far beyond the issues before it to consider matters only peripheral to a decision in the case. In particular, the Federal Circuit decided that Section 1500 is triggered whenever there are two cases pending at the same time that arise from the same operative facts, regardless whether plaintiffs have a choice of forum. In so ruling, the court overruled decisions which had stood for many years, thereby reaching results inconsistent with the legislative history of Section 1500 and accepted judicial interpretation.

Specifically, the Court overturned *Casman v. United States*, 135 Ct. Cl. 647 (1956) and cases which follow that decision. The *Casman* line of cases essentially hold that Section 1500 does not operate if the other suit in the other court seeks relief the Claims Court cannot grant. In *Casman*, the plaintiff had been discharged from the Office of Military Governor in Narnberg, Germany. He sued in the district court seeking restoration to his former position. After he had won in district court, but while the case was on appeal by the Government, Casman sought back pay in the Court of Claims. In response to the Government's motion to dismiss the Court of Claims suit pursuant to Section 1500, the Court of Claims looked to the legislative history quoted above and to *Matson Navigation Co. v. United States* 284 U.S. 352 (1932),[12] both of which, it noted, speak in terms of requiring a plaintiff to make an election. It denied the Government's motion, stating:

> Here the plaintiff obviously had no right to elect between courts. The claim in this case and the

[12] In *Matson*, this Court stated that the purpose of Section 1500 "was only to require an election between a suit in the Court of Claims and one brought in another court . . . ." *Id.* at 355-56.

> relief sought in the district court are entirely different. The claim of plaintiff for back pay is one that falls exclusively within the jurisdiction of this court, and there is no other court which plaintiff might elect [citation omitted]. On the other hand, the Court of Claims is without jurisdiction to restore plaintiff to his position.

Casman, 135 Ct. Cl. at 650. The *Casman* Court's logic is impeccable, and its reading of the legislative history and the prior teachings of this Court are accurate. No wonder that the *Casman* principle has been consistently followed and recently reaffirmed. *See Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). The *UNR* Court overturned these cases as well. *See UNR*, 962 F.2d at 1022 n.3.

The fundamental premise of these decisions, now overruled by *UNR*, is that Section 1500 only applies when a litigant has a choice of forum. The Federal Circuit rejected without discussion this principle to reach a conclusion we submit is wrong. Since the issue is of great importance to *amicus* and its members we urge the Court to address this part of the Federal Circuit's opinion even though it may not be necessary to decide the precise issue before it.

As quoted above, Senator Edmunds, who provided the only legislative history, twice mentions "put[ting] to their election" the class of plaintiffs who have the choice of suing in the district court or the Claims Court. Applying Section 1500 makes sense where a plaintiff has the choice of electing between filing a claim in Claims Court or a district court,[13] but makes little sense where the plaintiff seeks relief that may only be granted by the Claims Court

---

[13] For example, district courts have concurrent jurisdiction with the Claims Court over certain tax claims and other civil actions not exceeding $10,000. *See* 28 U.S.C. § 1346(a).

and separate relief that may only be granted by a district court. In such instances, the plaintiff lacks the ability to make an "election" and "leave" one court or the other.

One example of such a scenario which is of particular importance to *amicus* is in the context of a denial of a wetlands permit. In such cases, the landowner may seek declaratory judgment or equitable relief in district court, and just compensation pursuant to a takings claim in Claims Court. If the value of the takings claim exceeds $10,000, the Claims Court has exclusive jurisdiction. *See* 28 U.S.C. §§ 1346(a); 1491(a)(1); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984). The Claims Court, however, lacks the authority to grant equitable relief. *See, e.g., Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam) (the Tucker Act "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States . . . . [t]he reason for the distinction flows from the fact that the Court of Claims has no power to grant equitable relief") (citation omitted). Thus, plaintiffs are barred by jurisdictional rules from bringing takings claims and equitable claims in the same court. Nonetheless, the result of the *UNR* decision is to foreclose a litigant from obtaining these distinct forms of relief against the United States, unless the litigant is fortunate enough to have his equitable claims completely resolved, including all appeals, before the statute of limitations bars his legal claim in Claims Court.

There is a larger principle involved here than a proper reading of legislative history or due regard to precedent. The Federal Government has established a judicial system to which litigants can appeal if they have been dealt with unfairly by the Government or have otherwise suffered as a result of governmental action. That system has its own complications, since in many cases, the jurisdictions of the various tribunals are exclusive and litigants cannot easily determine in which court they should proceed.

But there are some jurisdictional matters which are clear. Only a federal district court can grant equitable relief, and its jurisdiction to grant monetary damages against the Government under the Tucker Act is limited to $10,000. The Claims Court, on the other hand, cannot in most instances grant equitable relief,[14] but is not limited in the amount of monetary damages it may award against the Government.

Given these jurisdictional principles, the *UNR* decision serves to prevent citizens from having the opportunity to fairly litigate their claims against the Government. Is it likely that Congress intended a citizen who is entitled to pursue both restoration of his status in equity and damages at law to forgo one measure of relief to gain the other? There is not a shred of evidence that Congress ever contemplated such an outcome and until *UNR* no court had suggested such a result. Certainly, an obscure statute designed "only to provide a substitute for the doctrine of res judicata," [15] should not be the vehicle for such a distortion of the law. Section 1500 was adopted to protect the Government from duplicative litigation that wastes legal resources, not to restrict

[14] The Claims Court has certain equitable power in "specific kinds of litigation." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988). In order "[t]o provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records . . . ." 28 U.S.C. § 1491(a)(2). *See also id.* § 1491(a)(3). This authority is limited by its terms to cases concerning federal employment and contracts. *Id.* In addition, this action can only be taken where such relief is "'. . . tied and subordinate to a monetary award.'" *Ellis v. United States*, 610 F.2d 760, 762 (Ct. Cl. 1979) (quoting *Austin v. United States*, 206 Ct. Cl. 719, 723, *cert. denied*, 423 U.S. 911 (1975)).

[15] *Section 1500 of the Judicial Code*, 55 Geo. L. J. at 578.

citizens from presenting legitimate claims for resolution in the federal courts.[16]

CONCLUSION

This Court should reverse the *en banc* decision of the Federal Circuit.

Respectfully submitted,

Of Counsel:
MARY V. DICRESCENZO
NATIONAL ASSOCIATION OF HOME BUILDERS
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0200

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Amicus

* Counsel of Record

[16] Furthermore, such a doctrine is at odds with the fundamental rule of statutory construction that a court will avoid an interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Where two statutes are at issue, they should be read to avoid an unconstitutional result and to give force to each. *See Ruckelshaus v. Monsanto*, 467 U.S. at 1018-19 (declining to read federal pesticide law as withdrawing Tucker Act remedy in the event the effect of the pesticide law is to take property. The *UNR* court's reading of Section 1500 would preclude parties from asserting takings claims under the Fifth Amendment against the Government if they have also filed claims challenging a permit denial, seeking equitable relief, or other actions. Such a reading fails to give meaning to both Section 1500 and the Tucker Act, and therefore is inconsistent with well-established rules of statutory construction.